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4 UNITED STATES DISTRICT COURT
5 DISTRICT OF NEVADA

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7 In re:
8 Carlton E Graham and Hyacinth A. Graham
9 Debtors.

Case No. 2:15-cv-00325-RFB-GWF
(Bankruptcy Appeal)

ORDER

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11 _____
12 Carlton E. Graham and Hyacinth A. Graham,
13 Appellants,
14 v.
15 PNC MORTGAGE, A Division of PNC
16 BANK, N.A.,
17 Appellees.

18 **I. INTRODUCTION**

19 This case involves an appeal of a bankruptcy court order. Appellants Carlton and Hyacinth
20 Graham (collectively, “Appellants”) appeal from the (a) Order Granting Motion for Relief from
21 the Automatic Stay (California Property); (b) Order Granting Motion for Relief from the
22 Automatic Stay (Nevada Property) (collectively, the “Stay Relief Orders”); (c) Order Denying
23 Debtors’ Motion to Declare PNC Mortgage, a Division of PNC Bank, N.A. an Unsecured Creditor
24 (the “Denial Order”); and (d) Order Overruling Debtors’ Objection to Claim 19-1 of PNC
25 Mortgage (“Nevada Claim Allowance Order,” and together with the Stay Relief Orders and Denial
26 Order, the “Orders”), entered by the U.S. Bankruptcy Court for the District of Nevada (the
27 “Bankruptcy Court”) on February 13, 2015.
28

1 The Notice of Appeal was filed on February 23, 2015. (ECF No. 1). The Opening Brief
2 was filed by Appellants on March 25, 2015. (ECF No. 5). Appellee PNC Mortgage (“Appellee”)
3 filed its Answering Brief concurrently with appendices on April 23, 2015. (ECF Nos. 8–10). The
4 instant Motion to Dismiss Appeal was filed on October 10, 2016. (ECF No. 11). Appellants
5 Responded on October 25, 2016, and Appellee Replied on November 2, 2016. (ECF Nos. 12, 13).
6 Appellants filed a Motion to Stay Order for Temporary Writ of Restitution or Stop Eviction on
7 November 28, 2016. (ECF No. 14). Appellee Responded on December 8, 2016. (ECF No. 15).

8 9 **II. FACTUAL BACKGROUND**

10 The Court finds the following facts relevant to this appeal. In April 2003, Appellants
11 obtained a mortgage loan from National City Mortgage Co. d/b/a Accubanc Mortgage in the
12 original principal amount of \$322,700 (the “Nevada Note”), to finance the purchase of residential
13 property located at 2706 Riceville Drive, Henderson, Nevada 89052 (the “Nevada Property”). The
14 Nevada Note is secured by a first-position Deed of Trust recorded on April 24, 2003 (the “Nevada
15 Deed of Trust”) in the Official Records in the Clark County Recorder’s Office (“Official
16 Records”).

17 Also in 2003, Appellants obtained another mortgage loan from National City Mortgage
18 Co. d/b/a Accubanc Mortgage in the original principal amount of \$296,000 (the “California Note,”
19 and together with the Nevada Note, the “Notes”), to finance the purchase of residential property
20 located at 841 South Whitney Court, San Dimas, California (the “California Property,” and
21 together with the Nevada Property, the “Properties”). The California Note is secured by a first-
22 position Deed of Trust recorded on June 9, 2003 in the Official Records, with National City
23 Mortgage Company serving as trustee thereunder, for the benefit of National City Mortgage Co.

24 Appellee, as successor by merger, is the holder of both the Notes and the Deeds of Trust.

25 On March 27, 2012, Appellants filed a voluntary petition for relief under Chapter 13 of the
26 Bankruptcy Code. On June 11, 2012, Appellee timely filed a secured proof of claim (assigned as
27 Claim 12-1) in the amount of \$200,074.29 relating to the California Property. On August 13, 2012,
28 Appellee timely filed a secured proof of claim (assigned as Claim 19-1) in the amount of

1 \$213,587.90 relating to the Nevada Property. Appellants would eventually object to both proofs
2 of claim filed by Appellee.

3 First, on June 18, 2013, Appellants objected to Appellee's proof of claim for the California
4 Property. (App. 46–64). Appellants contended that Appellee did not hold an interest in the
5 California Note and Deed of Trust. (See *id.*). In response, Appellee demonstrated that, as holder
6 of the Note, it was entitled to enforce the Note. (App. 65–117). On October 21, 2013, the
7 Bankruptcy Court entered an order overruling Appellants' objection to Appellee's proof of claim
8 of the California Property. (App. 121–23).

9 Similarly, on November 19, 2014, Appellants objected to Appellee's proof of claim for the
10 Nevada Property on the basis that, among other things, the Nevada Note and Deed of Trust was
11 securitized. (App. 240–251). In response to Appellants' objection, Appellee demonstrated that it
12 could enforce the Nevada Note as the note holder. (App. 251–335). The Bankruptcy Court rejected
13 Appellants' arguments, and on February 13, 2015, entered an order overruling Appellants'
14 objection to Appellee's proof of claim on the Nevada Property. (App. 399–401).

15 Prior to filing of the bankruptcy action ultimately giving rise to this appeal, on or about
16 March 12, 2012, the Appellants filed a Petition for Judicial Review in Nevada state court
17 challenging Appellee's authority to foreclose on the Nevada Property. Appellee filed its Response
18 brief to the Petition for Judicial Review in state court on March 27, 2012, the same date Appellants
19 initiated the bankruptcy proceedings ultimately giving rise to this appeal. Appellants then obtained
20 a continuance of final resolution before the Bankruptcy Court at least twenty-nine times, and the
21 Nevada Property languished for three years in the mandatory bankruptcy stay.

22 On November 18, 2014, Appellee moved for entry of an order in the Bankruptcy Court,
23 pursuant to 11 U.S.C. § 362(d)(1), terminating the automatic stay to the Nevada Property and the
24 California Property because Appellants had made no post-petition payments to Appellee relating
25 to the Nevada Property under the Nevada Note or relating to the California Property under the
26 California Note. The Appellants had not actually made any payments on the Nevada Property since
27 at least as early as December 2010. On February 17, 2015, the Bankruptcy Court entered its stay
28 relief orders, which lifted the automatic stay of the Nevada Property and the California Property.

1 After the Bankruptcy Court lifted the stay, the state district court resumed the action on the Petition
2 for Judicial Review. On or about April 9, 2015, the state court issued its Findings of Fact and
3 Conclusions of Law and thereby rejected all of Appellants' arguments, many of which are raised
4 in this Court, and found that a foreclosure certificate may issue. On or about April 27, 2015,
5 Appellants filed a notice of appeal of the state court action. The parties briefed the issues before
6 yet another tribunal. On or about December 31, 2015, the Nevada Court of Appeals issued its
7 Order of Affirmance.

8 On or about January 28, 2016, Appellee properly recorded a notice of sale on the California
9 Property. On or about May 12, 2016, Appellee conducted a foreclosure sale on the California
10 Property. Non-parties Ninhchau Nguyen and Yen Pham purchased the California Property at the
11 foreclosure sale. On or about May 2, 2016, Appellee recorded its Foreclosure Certificate from the
12 Nevada Mediation Program. On or about July 26, 2016, Appellee recorded a notice of sale of the
13 Nevada Property. On or about August 26, 2016, Appellee conducted a foreclosure sale. Non-party
14 NREI, LLC purchased the Nevada Property at the foreclosure sale. (Exhibit C, Trustee Deed). On
15 or about September 6, 2016, a trustee's deed was recorded on the Nevada Property.

16 17 **III. LEGAL STANDARD**

18 On appeal to the District Court, the Bankruptcy Court's conclusions of law are reviewed
19 *de novo*, and its factual findings are reviewed for clear error. In re Summers, 332 F.3d 1240, 1242
20 (9th Cir. 2003).

21 "Bankruptcy appeals may become moot in one of two (somewhat overlapping) ways. First,
22 events may occur that make it impossible for the appellate court to fashion effective relief. . . . For
23 example, when a trustee has already sold assets to third parties, a court may be powerless to undo
24 what has already been done. . . . However, the party asserting mootness has a heavy burden to
25 establish that there is no effective relief remaining for a court to provide." In re Focus Media, Inc.,
26 378 F.3d 916, 922 (9th Cir. 2004), cert. denied by 544 U.S. 968 (2005) (citations and quotation
27 marks omitted). "Second, an appeal may become equitably moot when appellants have failed and
28 neglected diligently to pursue their available remedies to obtain a stay of the objectionable orders

1 of the Bankruptcy Court, thus permitting such a comprehensive change of circumstances to occur
2 as to render it inequitable to consider the merits of the appeal. . . . [This may occur where, for
3 example,] appellants did not at any time apply to the bankruptcy judge for a stay[.]” Id. (citations
4 and quotation marks omitted).

5 Generally, appellants must obtain a stay before filing an appeal of a sale of assets, for the
6 purpose of upholding the “dominant rationale” of finality in bankruptcy. In re Onouli-Kona Land
7 Co., 846 F.2d 1170, 1172 (9th Cir. 1988). “[H]owever, our past reliance on the rationale of a
8 court’s inability to fashion relief leaves an exception to bankruptcy’s mootness rule. Since we first
9 allowed this exception, for cases in which a court is able to fashion relief, the exception has
10 operated in only one situation: where real property is sold to a creditor who is a party to the appeal.”
11 Id. (citations and quotation marks omitted). “[T]his exception for real property sold to a party-
12 creditor is especially appropriate where the foreclosure sale is subject to statutory rights of
13 redemption.” Id. at 1172-73 (citation and quotation marks omitted). It therefore follows that
14 “[b]ankruptcy’s mootness rule operates only when a purchaser bought an asset in good faith” either
15 where the purchaser is a non-party or where the purchaser is a party to the appeal with no statutory
16 right of redemption. Id. at 1173 (citation omitted).

17 18 **IV. DISCUSSION**

19 In their Opening Brief, Appellants reiterate their arguments from the underlying
20 proceedings as to the invalidity of the sales of the Properties. Appellants assert that there is no
21 tenancy that would replace them, and focus exclusively on challenging the Bankruptcy Court’s
22 orders denying their objections to Appellee’s then-existing claim to the Properties and authority to
23 foreclose, and lifting the stay and allowing the sale of the Properties. Appellee argues that this
24 appeal should be dismissed on both mootness grounds: (1) the Properties have been sold to non-
25 party good faith purchasers; and (2) the Appellants never sought a stay of the bankruptcy order
26 lifting the stay and permitting the foreclosure sales. Appellee further argues that effective relief is
27 impossible because the Court has no authority with respect to the current title holders who, as bona
28 fide purchasers, are protected. Appellants request in their Motion that their eviction from the

1 Nevada Property be stayed pending resolution of the appeal, as constructive eviction is already in
2 progress.

3 The Court has reviewed the record and briefings and finds that the instant bankruptcy
4 appeal is moot upon both mootness grounds set forth in In re Focus Media. First, it is impossible
5 for this Court to fashion effective relief. In so finding, the Court looks to case law on equitably
6 setting aside a foreclosure sale, as such determination is closely related to this mootness ground.
7 Here, the Properties have undisputedly been sold to non-parties to the appeal who were not
8 involved with the initial sale of the property. The Court finds that these non-party buyers purchased
9 the Properties in good faith. The Court further finds that effective relief is impossible because the
10 Court lacks jurisdiction over the non-party purchasers as well as the Properties at this time.

11 Even if the Court could somehow fashion effective relief, the Court must consider the
12 totality of the circumstances when deciding whether a basis exists to set aside a sale of a property
13 to a non-party that made the purchase for value. The Nevada Supreme Court has recognized that
14 whether or not there was an “innocent” bona fide purchaser for value is an important consideration
15 in evaluating the equities in an action for equitable relief from a foreclosure. Shadow Wood HOA
16 v. N.Y. Cmty. Bancorp., 366 P.3d 1105, 1114-15 (Nev. 2016). A bona fide purchaser is one who
17 “takes the property ‘for a valuable consideration and without notice of the prior equity, and without
18 notice of facts which upon diligent inquiry would be indicated and from which notice would be
19 imputed to him, if he failed to make such inquiry.’” Id. at 1115 (citations omitted). Appellants do
20 not contest that the third party purchasers purchased the Properties for value, nor do Appellants
21 argue that the third parties committed any fraud. Appellants also fail to demonstrate that the third
22 parties had notice of Appellants’ claim in equity, as a foreclosure sale pursuant to a deed of trust
23 terminates the prior owner’s property interest. Id. at 1116. As the Nevada Supreme Court made
24 clear in Shadow Wood, “[t]hat [the prior owner] retained the ability to bring an equitable claim to
25 challenge [the] foreclosure sale is not enough in itself to demonstrate that [the purchaser] took the
26 property with notice of any potential future dispute as to title.” Id. Thus, even if this Court had
27 authority to reconsider what appears to be a final state court action finding that the foreclosure
28 sales may proceed, and even if the Court could take action without the purchasers being parties to

1 the appeal, it would lack the power to reverse the sales absent some showing of equities sufficient
2 to overcome the position of the “innocent” purchasers. No such showing has been made in this
3 case.

4 The Court also finds that the second In re Focus Media mootness ground is established.
5 The record demonstrates that Appellants never sought a stay of the bankruptcy order they objected
6 to, which permitted the sales. The Bankruptcy Court lifted the automatic stay on February 17,
7 2015. The “objectionable order” from the Appellants’ perspective was thus entered over nineteen
8 months before Appellants’ request for relief in the instant case. Appellants did not seek a stay of
9 that order during the remainder of the bankruptcy action and have not sought a stay in this appeal
10 either. As the Appellants did not seek a stay of the bankruptcy order, the Court finds that they were
11 not diligent in pursuing remedies to the sale. Appellants had an opportunity to seek relief and they
12 offer no persuasive reason for not diligently doing so. The appeal is therefore also dismissed on
13 this basis.


14
15 **V. CONCLUSION**

16 For the reasons discussed above,

17 **IT IS ORDERED** that Appellee’s Motion to Dismiss (ECF No. 11) is GRANTED. The
18 appeal is dismissed.

19 **IT IS FURTHER ORDERED** that Appellants’ Motion to Stay Order for Temporary Writ
20 of Restitution and to Stop Eviction (ECF No. 14) is DENIED. The Clerk of Court is ordered to
21 close this case.

22 DATED: July 18, 2018.

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25 **RICHARD F. BOULWARE, II**
26 **United States District Judge**
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